

Courts and Regulatory Governance in Latin America

Improving Delivery in Development by Managing Institutional Interplay

RENE URUEÑA

Courts and the Regulatory State in the South

Almost 25 years have passed since the first institutional reforms in Latin America were implemented, following a wide trend toward the privatization of public utilities and other basic services. Part of this deep transformation entailed the adoption of regulatory forms of governance, that is, the role of an interventionist state was reduced in favor of a state whose intervention in the economy was done mostly through rules and regulation instead of taxing and spending.¹ One common institutional feature of this transformation was the independent regulatory agency (IRA). The basic premise was that certain areas of the economy, such as public utilities, telecommunications, and banking, were better served if the regulator remained at arm's length from political pressures. The answer was to create law-based "agencies," acting mostly through administrative means on the basis of a particular kind of expertise. The independence of these agencies would foster "credible commitments" on behalf of the state and limit regulatory opportunism.² Moreover, in the context of privatization, such independence would also provide much-needed assurance to foreign investors that their sunk costs would not be affected by administrative expropriation or manipulation.³

Latin America was particularly fertile ground for the logic of "credible commitments."⁴ During the 1990s, independent regulatory agencies proliferated in the region at a rate never before seen. Jacint Jordana and David Levi-Faur report that only 43 regulatory authorities (mostly in the financial sector)

-
- 1 See Giandomenico Majone, *From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance*, 17(2) J. Pub. Policy 139–67 (1997).
 - 2 See Fabrizio Gilardi, *Policy Credibility and Delegation to Independent Regulatory Agencies: A Comparative Empirical Analysis*, 9(6) J. European Pub. Policy 873–93 (2002).
 - 3 See Brian Levy & Pablo T. Spiller, *Institutional Foundations of Regulatory Commitment: A Comparative Analysis of Telecommunications Regulation*, 10 J. L. Econ. & Org. 201 (1994).
 - 4 See Vivien Foster, *Ten Years of Water Service Reform in Latin America: Toward an Anglo-French Model* (Intl. Bank Reconstruction & Dev.; World Bank 2005).

existed in the region before 1979; by 2002 they had grown threefold to 138.⁵ These numbers, though, do little to explain the impact that such proliferation has in the delivery of basic services in the region. Although the *form* of the IRA was widely adopted in Latin America (and elsewhere in the world), little is known about the actual *operation* of IRAs in their own contexts, and particularly their role in boosting (or hindering) the delivery of the essential services that they regulate.⁶

This gap seems to be particularly pressing in economies outside Europe and the United States, where the work of IRAs seemed to follow a different trajectory from that predicted by the “credible commitments” literature. This gap has been explored in recent literature through the lenses of the “Regulatory State in South.”⁷ From this perspective, certain shared contexts of countries in the “South” (e.g., the presence of powerful external pressures, especially from international financial institutions, the greater intensity of redistributive politics in settings where infrastructure services are of extremely poor quality, and limited state capacity) are crucial to understanding regulatory governance in poorer economies— a reality that simply is lost in the perspective of regulatory transfer and diffusion. Understanding the impact of these shared contexts in the regulatory state is important for advancing regulatory theory and understanding the possibilities (and limits) of regulation in the delivery of essential services to the poorest.

One key insight on the Regulatory State in the South project, which was led by Navroz K. Dubash and Bronwen Morgan and consisted of case studies of regulatory governance in countries outside the North Atlantic, was that courts are central actors in regulatory governance in developing countries. Traditional literature on the regulatory state situates the judiciary as protecting contract and property rights, thus limiting state action and curbing discretion.⁸ In sharp contrast to this view, the experiences of the water sector in Colombia and Indonesia, and of telecommunications in India, show that the judiciary is a privileged site of regulatory governance where international pressures, distributive politics, and limited state capacity operate.⁹

5 See Jacint Jordana & David Levi-Faur, *The Diffusion of Regulatory Capitalism in Latin America: Sectoral and National Channels in the Making of a New Order*, 598(1) *Annals Am. Acad. Pol. & Soc. Sci.* 102–24 (2005).

6 *Id.* See also Jacint Jordana, David Levi-Faur, & Xavier Fernández i Marín, *The Global Diffusion of Regulatory Agencies Channels of Transfer and Stages of Diffusion*, 44(10) *Comp. Pol. Stud.* 1343–69 (2011); David Levi-Faur, *The Global Diffusion of Regulatory Capitalism*, 598(1) *Annals Am. Acad. Pol. & Soc. Sci.* 12–32 (2005).

7 See Navroz K. Dubash & Bronwen Morgan, *Understanding the Rise of the Regulatory State of the South*, 6(3) *Regulation & Governance* 261–81 (2012). The Regulatory State in the South project explores the possibility of finding particular characteristics in regulatory governance as applied in the global South that are different from the same type of governance in the North.

8 *Id.*

9 On Colombia, see Rene Urueña, *Expertise and Global Water Governance: How to Start Thinking about Power over Water Resources?*, 9 *Anuario Mexicano de Derecho Internacional* 117–52 (2012); on Indonesia, see Nai Rui Chng, *Regulatory Mobilization and Service Delivery at the Edge*

Much has been said about the importance of the judiciary to economic and social development, particularly in Latin America, where activist courts have engendered economic transformations.¹⁰ Courts are, indeed, a crucial site of distributive politics in the region. However, current efforts have been either focused on the justiciability and enforcement of social and economic rights or taken place in the context of rule of law programs concerned with reducing court backlogs, enhancing judicial training programs, and eliminating judicial corruption. The Regulatory State in the South project brought forth a different perspective on this nexus: in these countries, courts became deeply immersed in formulating regulatory regimes or reforming regulatory agencies; they became crucial players in the delivery of essential services, both as actors in their own right and as an institutional forum in which other actors could interact.

This chapter further investigates the implications of this insight for the delivery of essential services in the region. Why do courts get involved in the regulatory process in Latin America? How is this involvement undertaken? What are the effects of courts' involvement in the regulatory process in Latin America in terms of accountability and participation? Who wins and who loses when courts intervene? To explore these questions, the chapter builds on research done by a group of early-career scholars on the ground in Brazil, Colombia, and Argentina who came together as questions on the role of the judiciary in regulatory politics became part of a wider project on interinstitutional interactions led by the Universidad de Los Andes (Colombia), with the support of the International Development Research Center.

The research on which this chapter is based focuses on health care, the environment, and public utilities. Carolina Moreno explored the intervention of the Colombian Constitutional Court in the regulation of waste disposal in Bogota and its impact on the human rights of informal waste pickers. Florencia Lebensohn investigated the role of environmental expertise and regulation by the judiciary, focusing on the Matanza-Riachuelo River basin case in Argentina. Maria Prada and Santiago Rojas researched the impact of the judiciary in the provision of health services in Colombia. One further set of case studies focusing on Brazil will be published in a separate volume edited by Mariana Mota Prado, of the University of Toronto. This latter set of cases is not discussed in this chapter.

While each of these case studies will be published soon, the goal of this chapter is to present some of the overall lessons that can be distilled in terms of voice and accountability in the delivery of essential services in the region. The overall point is that the interaction between institutions matters for improving

of the *Regulatory State*, 6(3) *Regulation & Governance* 344–61 (2012); on India, see Arun K. Thiruvengadam & Piyush Joshi, *Judiciaries as Crucial Actors in Southern Regulatory Systems: A Case Study of Indian Telecom Regulation*, 6(3) *Regulation & Governance* 327–43 (2012).

10 See Roberto Gargarella, Pilar Domingo & Theunis Roux, *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Ashgate 2006); David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 *Harv. Intl. L. J.* 319 (2010).

delivery of development in Latin America—and courts are a crucial player in such dynamics. The research focuses on three central ideas: first, the notion of a “regulatory space” (both national and global), and its importance in improving delivery; second, the idea of institutional adaptation, and why deviating from “best practices” may not be such a bad thing after all; and, third, the importance of knowledge and experimentalist governance as a platform for fostering better governance. The final section concludes the chapter.

Interaction in a Regulatory Space: National and Global

Although the diffusion of IRAs is a well-established fact, their outcomes cannot be understood by focusing on agencies as discrete units acting in isolation of other institutions. The challenges that regulation poses to the delivery of essential services can be better understood if the analytical unit is the *space* where interaction between institutions takes place. In this regulatory space, institutions are dynamic; they change and adapt to their interactions, defining the regulatory framework that impacts delivery of essential services.

A National Regulatory Space

A good way to begin thinking about this regulatory space is to highlight that IRAs do not enter a regulatory vacuum when they are implemented locally. A national ecosystem of institutions and actors is already in place when IRAs are adopted (as they were, for example, in Latin America during the 1990s), and there is some sort of regulation that needs to be adopted, transformed, or replaced through the work of the IRAs. These agencies enter as actors in a space where regulation is *already* being adopted, discussed, implemented, and rejected. As time passes, some IRAs become the main player in the regulatory field, as seen in some of the countries examined herein. However, these dominant agencies do not completely crowd out the regulatory space; on the contrary, this space includes both the IRAs and other relevant actors, with whom IRAs interact.

The notion of a regulatory space was suggested as a reaction to the narrow reading of the regulatory process in terms of a conflict between public authority and private interests. Against this view, the regulatory process can be better understood as a “space,” where it becomes possible to explore the “complex and shifting relationships between and within organizations at the heart of economic regulation.”¹¹ The key is “to understand the nature of this shared space: the rules of admission, the relations between occupants, and the variations introduced by differences in markets and issue arenas.”¹²

The image of a regulatory space aptly captures some of the dynamic interactions between IRAs and courts we observed in our research. Most of the

11 Leigh Hancher & Michael Moran, *Organizing Regulatory Space in Capitalism, Culture, and Economic Regulation*, 271 (Leigh Hancher & Michael Moran ed., Clarendon Press 1989).

12 *Id.*

regulatory outcomes we encountered (particularly pertaining to waste management and health regulation in Colombia and environmental regulation in Argentina) were not the product of an isolated IRA making a decision but the result of a set of actors that interacted and, through their interaction, determined the outcome. Understanding the impact of regulation in the delivery of development requires a focus not on IRAs alone but on the regulatory space they inhabit.

The notion of a space is useful to think about the way in which regulatory governance is undertaken and experienced in the cases we researched in Latin America. Delivery of essential services may be affected as IRAs compete with other actors or develop efforts to coordinate with or even co-opt competing agencies, a dynamic that has been observed in international relations, transnational business governance, environmental governance, and domestic regulation.¹³

With the exception of Leigh Hancher and Michael Moran's early insights, the interplay within regulatory spaces has been mostly overlooked by administrative law scholarship, which has focused on individual agencies and their procedures. Recently, some U.S. scholarship has explored interaction,¹⁴ focusing on interagency interaction and coordination as a problem of overlapping legislative delegation.¹⁵ In this line of scholarship, courts are outside the shared regulatory space and act through judicial review in order to hinder or foster cooperation.¹⁶ Our approach is different; it considers courts not as external to the regulatory space but as actors within it, with the same standing as IRAs. This, of course, has implications for judicial review, which are explored in the last section of the chapter.

The Matanza-Riachuelo River basin case, researched by Florencia Delia Lebensohn in Argentina, provides a glimpse of the way in which interactions in the regulatory space may hinder the delivery of a healthy environment in Latin America. The Matanza-Riachuelo River basin is home to Argentina's largest concentrations of urban poor, housing almost eight million people who live mostly in shantytowns that lack basic infrastructure. The basin is horribly polluted; consequently, diarrhea, breathing problems, skin diseases, and

13 On international relations, see Kenneth W. Abbott, Jessica F. Green, & Robert O. Keohane, *Organizational Ecology and Organizational Strategies in World Politics*, 13–57 (Harv. Kennedy Sch. Govt. Discussion Papers 2013); on transnational business governance, see Burkard Eberlein et al., *Transnational Business Governance Interactions: Conceptualization and Framework for Analysis*, 8(1) *Regulation & Governance* 1–21 (2014); on environmental governance, see Sebastian Oberthür & Thomas Gehring, *Institutional Interaction: Ten Years of Scholarly Development in Managing Institutional Complexity: Regime Interplay and Global Environmental Change* 25–58 (Sebastian Oberthür & Olav Schram Stokke eds., MIT Press 2011).

14 See Keith Bradley, *The Design of Agency Interactions*, 111(4) *Colum. L. Rev.* 745–94 (2011); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 *Harv. L. Rev.* 1131 (2011).

15 See Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 1 *S. Ct. Rev.* 201–47 (2006).

16 See Freeman & Rossi, *supra* note 14.

other health problems are common. Cleanup efforts have been undertaken since the 1960s to no avail, a situation that has been traditionally chalked up to a failure of governance and incoherent regulation. More than 50 sets of rules apply to the river basin, which is under the concurrent jurisdiction of the federal government, the government of the Autonomous City of Buenos Aires, the government of the Province of Buenos Aires, and the governments of 14 municipalities. The Inter-American Development Bank approved a US\$250 million loan in the late 1990s that was never used because governance problems proved to be an insurmountable obstacle.¹⁷

Lebensohn reports that, in 2004, a group of neighbors filed a claim for damages based on conditions in the basin. The Supreme Court of Argentina adopted two wide-ranging decisions (in 2006 and 2008), which led to an integrated cleanup plan for the basin. The plan can be seen as an effort by the court to organize a regulatory space left in chaos by the historical failure of traditional agencies. It gave specific directions for the coordination of most of the concerned agencies, culminating in the creation of a new agency, the Autoridad de la Cuenca Matanza-Riachuelo (ACUMAR), something akin to a regulatory joint venture, with the participation of the federal government and the provincial and city governments of Buenos Aires.

ACUMAR was structured like an IRA and became the crucial player for implementing the cleanup effort. However, its role cannot be understood in isolation of the court's intervention, either before or after its establishment in 2006. ACUMAR is constantly in touch with the Supreme Court, which played a big role in its creation and whose stature boosts its legitimacy, and with the federal court, which oversees the implementation of the cleanup efforts and provides a forum for the enforcement of those efforts, imposing fines in cases of noncompliance.

This interaction opened new spaces for participation and accountability in Argentina's environmental regulatory process. The Supreme Court itself allowed for participation in its public sessions as it discussed the cleanup plan (thereby defining a procedure that has since been used in matters beyond this case). Moreover, the court also ordered the ombudsman to set up a commission, the Comision de Participacion Social, to receive suggestions in relation to the cleanup plan. This body is composed of local nongovernmental organizations (NGOs), which distribute updated information and have standing to file administrative challenges before ACUMAR in matters related to the plan. As discussed later, a similar pattern was found in the Colombian case of health care, where the Constitutional Court held public hearings, which were widely attended, and required other institutions involved to provide for

17 See Decree No. 145/98, by which the Executive Branch approved a model contract to be entered into between the National Bank of Argentina and the Inter-American Development Bank to receive the US\$250 million loan to clean the Matanza-Riachuelo River basin. The contract was signed on Feb. 5, 1998, between the Argentine state and the Inter-American Development Bank. See Florencia Delia Lebensohn, *Regulatory Role of the Supreme Court of Argentina: The Matanza-Riachuelo River Basin Case* (on file with author).

spaces of participation and notice-and-comment procedures in their regulatory processes.

The Matanza-Riachuelo River basin case evidences the existence of a regulatory space where IRAs act and a possible role that courts could play in facilitating essential services. In Argentina, the regulatory space was densely populated by numerous institutions with overlapping mandates, which proved to be an obstacle for effectively solving the pollution problem. The Supreme Court thus entered to organize the regulatory space and, by doing so, it opened spaces of participation and accountability. The court, though, triggered the creation of a new agency. That is one more actor in the regulatory space that has to interact with existing agencies, which in turn will adapt their strategies, forcing ACUMAR to adapt its own. Interactions in the regulatory space are in this sense decidedly nonlinear: the shape of the regulatory space changes as interactions occur and creates loops that influence the actors, their behavior, and cognitive frameworks.

A Global Regulatory Space

The regulatory space that IRAs inhabit is mostly circumscribed by national borders; IRAs interact mostly with other national institutions, and their impacts are felt within nation-states. That was the case in Colombia, where domestic IRAs interacted with domestic courts in order to solve social problems, thus affecting the regulatory process. But some interactions may also involve international institutions, such as international development banks or international courts. These interactions are part of an emergent “global administrative space,” which has been defined as “a space, distinct from the space of inter-state relations governed by international law and the domestic regulatory space governed by domestic administrative law, although encompassing elements of each.”¹⁸

Some aspects of regulatory governance in Latin America have been situated in the global regulatory space, particularly in connection with investment arbitration and the human rights to water.¹⁹ Our research confirms the importance of this space beyond the nation-state.

In the Matanza-Riachuelo River basin, the Supreme Court expressly tied the monitoring of ACUMAR’s performance to the use of international

18 See Benedict Kingsbury, Richard B. Stewart, & Niko Krisch, *The Emergence of Global Administrative Law*, 68 L. & Contemporary Problems 15–61 (2005).

19 On investment arbitration, see Andréa Rocha Postiga, *A emergência do Direito Administrativo Global como ferramenta de regulação transnacional do investimento estrangeiro direito*, 10(1) *Revista de Direito Internacional* (2013), doi:10.5102/rdi.v10i1.2369; Nicolás M. Perrone, *Los tratados bilaterales de inversión y el arbitraje internacional: ¿En dirección al mejor funcionamiento de las instituciones domésticas?* 17 *Revista de Derecho* 63–88 (2012); Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law* (N.Y.U. Pub. L. & Leg. Theory Working Papers, Sept. 2009), http://lsr.nellco.org/nyu_plltwp/146. On water rights, see Rene Urueña, *The Rise of the Constitutional Regulatory State in Colombia: The Case of Water Governance*, 6(3) *Regulation & Governance* 282–99 (2012).

indicators, which fostered the adoption of quantitative instruments developed by the United Nations Economic Commission for Latin America (ECLAC), which became crucial to ACUMAR's task. More important, though, was the role of the World Bank. Lebensohn writes that, soon after the 2008 decision, Argentina secured from the World Bank one of the largest loans to a Latin American country for environmental purposes: US\$1 billion. The grant was directly geared to boosting the cleanup effort by ACUMAR and others. The role of the World Bank in shaping interactions in the emerging global regulatory space cannot be understated. One part of the story is, obviously, financial clout: the Bank is in a privileged position to steer resources to particular players, thus boosting one actor and not the other. In this case, the Bank supported the Supreme Court's role in organizing the Argentinean regulatory space and put its funds behind ACUMAR.

Perhaps as important as its financial muscle is the Bank's *epistemic* clout: its intervention lends expert authority to some of the players in the regulatory space. In this case, the Bank's expertise lent its aura of technocratic expertise to ACUMAR, which badly needed it in order to become an important player in an already populated regulatory space. Most crucially, the Bank helped define the "problem" to be tackled: the overall shape of the regulatory space, both domestic and global. The Bank's role here was to underscore that the problem was one of *governance* (and not of, say, availability of technology or of technical capacity), hence the strategy was to boost the institutional capacity of ACUMAR. This exercise of epistemic framing was important in the process of improving delivery of essential services in that it created the conceptual infrastructure that will guide the decision-making process in the future.

Policy Transfers, "Best Practices," and Deviations

IRAs are not merely "transplanted" or their policies "transferred" from their original site (usually the Anglo-Saxon world) into a new environment (in this case, Latin America). The trajectory of independent regulatory agencies examined suggests that institutions that are "transplanted" are then transformed by contextual interactions, creating doubt as to whether, over time, the very idea of "transfer" is still useful.

The Matanza-Riachuelo River basin case is a clear example of this dynamic. ACUMAR was created with the sole purpose of regulating and managing the cleanup project, but it had an unclear policy goal (beyond, of course, the general objective of cleaning up the basin). Its ideological and technical bent remained unclear as it started operating: was it a strong proenvironment agency that would use its legitimacy to prioritize the cleanup effort over all other (economic) interests? Or was it an agency more akin to a public utilities regulator, concerned with economic efficiency and cost recovery?

As it turned out, ACUMAR was neither. Its emphasis changed as it interacted with other actors in the regulatory space—from focusing on the environment, to considering costs, and then back to the environment. This

finding differs from the idea of policy transfer, which implies that the “policy” remains for the most part unchanged as it is transferred.²⁰ To be sure, the idea of “transfer” does acknowledge that the policy must “take root” and deal with its context, but it frames this as a problem of effectiveness; the policy’s internal rationale remains untouched. The same can be said of literature on transplants and “legal origins,” and the prescriptive agenda attached thereto,²¹ which has had some influence on thinking within multilateral institutions working in the development field.²² The concept of transplant assumes that law is an instrument that can be used to solve certain kinds of problems in varying contexts. Again, the most sophisticated versions of this literature acknowledge that the effectiveness of these transplants may require that the context be considered, but the instrument itself is not transformed as it is used. The focus remains on the IRA as an isolated and static actor that adopts regulation based on its expertise and that is required to consider the impact of its regulation on the wider context but remains oblivious of the effects of the wider context on itself.

In contrast, our research suggests that the internal rationale of some IRAs does change as their policies are implemented over the years, and courts have an important role in this process. The case of waste management in Bogotá, researched by Carolina Moreno, provides an example. Colombia is a standard case of expertise-based regulation for public utilities, adopted by IRAs established in the 1990s. In the case of Bogotá, waste management was arranged, also in the 1990s, through the concession of exclusive service areas to private providers. The creation of these exclusive areas required the approval of the national IRA; once approved, the municipality’s independent agency signed the concession contracts with private providers and set the tariff structure through the contract. In doing this, both the national IRA and the municipality’s agency followed an efficiency-based rationale, in which the main considerations were cost recovery and universal coverage.

As Moreno reports, this regulatory framework overlapped with the human rights of informal waste pickers (*recicladores*), who traditionally have earned a living by going through the city’s garbage containers. The tariff structure failed to recognize a cost associated with their work. Moreover, it established a duty on consumers: to dispose of waste using private concessionaries (mainly through closed garbage containers, which could be picked up by trucks), thus putting waste pickers out of business. This conflict ended up before the Constitutional Court, which ordered that the tariff structure both take into consideration the human rights of waste pickers and, eventually, strike down the whole bidding process—not because of disputes related

20 David P. Dolowitz & David Marsh, *Learning from Abroad: The Role of Policy Transfer in Contemporary Policy-Making*, 13(1) *Governance* 5–23 (2000).

21 Rafael La Porta, Florencio Lopez-de-Silanes, & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46(2) *J. Econ. Lit.* 285–332 (2008).

22 Alvaro Santos, *The World Bank’s Uses of the “Rule of Law” Promise in Economic Development*, in *The New Law and Economic Development: A Critical Appraisal* 253–300 (David M. Trubek & Alvaro Santos ed., Cambridge U. Press 2006).

to the contract but because the tariff structure underlying the bidding process failed to consider the human rights of informal waste pickers.²³

The trajectory of the regulatory agency in this case suffered important changes. As it interacted with the Constitutional Court for almost a decade, both the national and the municipal IRAs struggled to include the language of human rights in their decision making. The Constitutional Court spoke in deontological terms, requiring the regulator to consider the right to work of waste pickers and, even more complex, their right to a “vital minimum,” that is, a constitutional construct that imposes on the state the duty to provide for the minimum material needs of its citizens so as to guarantee their dignity. The regulatory agencies, in contrast, had a fairly functionalist view of rights and the law; their role was to create a predictable and stable environment for the investor and to respect property and contractual rights.

The clash of rationalities was imminent, but it did not lead to paralysis. The independent agencies shifted their discourse and developed a different kind of regulation but still maintained the overall structure of privatization and concessions. Interestingly, even after the recent political upheaval in Bogotá concerning waste management, when a left-wing mayor tried to terminate the concession contracts, the basic tariff structure remained in place. The deep grammar of regulation that resulted from the interaction between the IRAs and the Constitutional Court, which mixed elements of both standard efficiency-seeking regulatory practice and human rights, became the new regulatory common sense in the country.

The fact that an institution (in this case, IRAs) needs to adapt to its context seems intuitive enough. However, the dynamics of change and adaptation seem foreign to the traditional reading of IRAs and their role in the delivery of essential services, as they continue to be portrayed as static actors with univocal rationality that “travels” across the world. Part of the problem is the idea of deviation from what are termed “best practices.” As seen earlier, the logic underlying IRAs is one of credible commitments, which in turn requires a certain level of independence from political pressures.

Interactions of the kind described here can be read as a deviation from these best practices. The fact that a Constitutional Court intervenes in the regulatory process can be read not as an exercise in adaptation but as a deviation from the required independence that makes for good regulation. There is a specific meaning attached to a “good” regulatory system, which can be easily consulted in the World Bank’s *Handbook for Evaluating Infrastructure Regulatory Systems*.²⁴ If a regulatory framework deviates from this standard, it is “wrong” and needs to be “fixed.”

23 Corte Constitucional Colombia, *Sentencia T-724*, M.P. Jaime Araujo Renteria (2003), <http://corte-constitucional.vlex.com.co/vid/-43620288>; Corte Constitucional Colombia; *Auto 275*, M.P. Juan Carlos Henao (2011), <http://www.corteconstitucional.gov.co/relatoria/2010/T-616-10.htm>.

24 Ashley C. Brown, Jon Stern, & Bernard William Tenenbaum, *Handbook for Evaluating Infrastructure Regulatory Systems* (World Bank 2006).

This prescriptive mode is often problematic, because there is the possibility of normative disagreement with the model of the state that underlies regulatory good practices, as embodied in instruments such as the *Handbook*, that is, the idea of the state as an interest-driven actor that should remain in the background as regulator rather than play an active role as service provider.²⁵ If such disagreement occurs, then best practices become impositions of multilateral institutions, which then trigger a political debate well known in Latin America.

Interestingly, though, the Colombian case study suggests that, in the case of regulatory governance, the disagreement seldom occurs at that level of “hot” ideological politics. Perhaps due to the amazing expansion of IRAs in Latin America, both defenders of best practices and those who resist them assume that the rationale underlying IRAs remains unchanged as time passes. Their rationale is seen as a “fact,” which one embraces or rejects but never tries to change. However, our research suggests that this is not necessarily the case. Even the basic (and admittedly debatable) understanding of the state changes as IRAs live out their lives in their national context. Sometimes it changes toward recognizing a more active role for the state, as was the case in the Colombian example, or it could change otherwise. As IRAs adapt to their environment, their inner rationale also adapts, and this transforms regulatory governance.

The same could be observed in the Matanza-Riachuelo River basin case, where there is clear agreement on the overall goal of environmental improvement. However, this goal triggered ever-changing regulatory strategies on behalf of ACUMAR, some of which reflect diverging ideological commitments, some more market-oriented than others. But this is hardly a case of mere deviation from best practices. It implies a complex process of interaction and adaptation that may lead to different courses of action to achieve the goal of an appropriate delivery of essential services, such as appropriate waste management or a clean environment. From this perspective, the experience of judiciary involvement in the cases researched in Colombia and Argentina suggests that there is a wide range of experimentation that is possible in regulatory governance, where institutions are players that repeatedly shape each other. Beyond the top-down approach of best practices, the trajectory of IRAs seems also to involve adaptation and learning from other institutions following a different rationale. This may suggest that a way to improve delivery of services is to go beyond best practices, and to gear the interaction and adaptation that is already occurring to a more purposeful process of experimentation.

Experimentalism, Expertise, and Interactions

Much of the dynamic described in the previous two sections can be thought of as instances of experimentalist governance, where an ultimate goal is set and autonomy is given to relatively independent agents to use different means

25 Megan Donaldson & Benedict Kingsbury, *Ersatz Normativity or Public Law in Global Governance: The Hard Case of International Prescriptions for National Infrastructure Regulation*, 14(1) Chi. J. Intl. L. 1–51 (2013).

to achieve that goal, subject to constant review and deliberation.²⁶ Confirming the need to go beyond best practices, our research suggests that this is an important angle when thinking about regulatory governance in Latin America. However, it still seems unclear whether this is an actual emergence of experimentalist governance in the region.

In this respect, the case of waste management in Bogotá stands in sharp contrast with the Matanza-Riachuelo River experience. Interaction between the Colombian judiciary and IRAs seems ill-suited for an experimentalist description; while the interaction indeed occurred and had impacts, it was not part of a purposive process of adaptation and experimentation toward an ultimate goal. Rather, it seemed to be an ad hoc process, with no clear ultimate goal and no organized system of review and deliberation. In this sense, while the waste management case does evidence a process of IRA adaptation triggered by interaction with a court, this process was not crucially driven by iterative sharing of knowledge. Instead, the injection of deontological values (such as human rights) into the functional contractual framework of concessions seems more an instance of *bricolage*, that is, the tinkering with the deep grammar of neoliberal regulatory governance to achieve new norms, without a notion of the causal pathways that would lead these new legal utterances to achieve the overall policy goal of a better waste management.²⁷ In contrast, the Argentinean case suggests a more structured process of experimentalist governance, where interaction in the regulatory space seems geared to better knowledge, which would enhance ACUMAR's effectiveness. The process implies the adoption of a broad goal (the cleanup), and of specific metrics (the UN's ECLAC indicators), under which the performance of the "autonomous" entity (ACUMAR) would be monitored in consultation with relevant stakeholders, who participated through the spaces opened by the ombudsman, following orders by the Supreme Court.

Even if the cases investigated provide uncertain evidence of an actual turn in Latin America toward experimentalist governance, such examples do underscore the importance of knowledge production and diffusion in regulatory governance in the region. Cognitive pathways develop, as knowledge flows between IRAs and other institutions that populate the regulatory space, transforming the way in which issues are framed and understood. To be sure, cognitive frameworks are important in general political processes,²⁸ but they seem particularly relevant in the case of regulatory governance, where techni-

26 Charles F. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, 14(3) *European L. J.* 271–327 (2008); Charles F. Sabel & Jonathan Zeitlin, *Experimentalist Governance*, in *The Oxford Handbook of Governance*, 169–86 (David Levi-Faur ed., Oxford U. Press 2012).

27 Claude Lévi-Strauss, *The Savage Mind*, Nature of Human Society Series (Weidenfeld & Nicolson 1966).

28 Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26(1) *Annual Rev. Sociology* 611–39 (2000).

cal expertise plays a key role in shaping the issues, suggesting causal relations, and providing legitimacy for IRAs and other actors in the regulatory space.

The important role of knowledge can be seen in the case study on Colombian health care developed by Maria Prada and Santiago Rojas. In 2006, after several years of massive failure in the implementation of a new health care system by regulators, the Colombian Constitutional Court stepped in, adopting an ambitious decision aimed at solving some of the system's structural problems. The problem, however, was that the court stepped into a regulatory space with a steep learning curve; health care is a very technical field that had been dominated by economists since liberalization occurred in the early 1990s. The complexities of the health care system were not lost to the court, which adopted a mammoth four-hundred-page decision that tried to find strategic bottlenecks in the system and gave specific orders to dozens of governmental institutions to fix them.

Foreseeing difficulties with the implementation of such a wide-ranging decision, the court implemented a complex monitoring procedure, where agencies constantly had to report back to the court on their improvements. During this process, the court oscillated between judicial activism in the form of direct regulation (mainly in the 2006 decision) and a more restrained tone, adopted during the monitoring process, deferent to the expertise of more-established players in the regulatory space. The institutional form of this dynamic mirrors that of the Matanza-Riachuelo case, as the Colombia court tried here to establish a structure of agency autonomy and monitoring, closely resembling ideas of experimentalist governance. The court would thus rely on the expertise of other agencies in the regulatory space to find the most appropriate means to achieve a given goal, but it still defined the goals to be achieved.

This structure required a reliable system of monitoring, which the court tried to develop by establishing the parameters for acceptable indicators, which would in turn be adopted by the regulatory agencies themselves, and then reported back to the court. Highlighting the global dimension of this process, the standard that the court adopted for this purpose was not national but international: the basic framework of health indicators developed by the Inter-American Commission of Human Rights, which became part of the health care regulatory space where the Colombian court acted. As noted earlier, a similar pattern was observed in the Argentinean case, where the Supreme Court used international indicators (in that case, the UN's ECLAC) to structure a credible system of monitoring.

The role of knowledge and expertise in the process of monitoring is remarkable. In sharp contrast with its strong ("activist") original decision, the follow-up process shows a court open to learn from the agencies it interacts with, a move that may point both to a more deferential attitude toward the technical expertise of these agencies and to the relative lack of political power of the court. Moreover, this attitude also applied to "experts" in civil society. The court held open hearings, where it invited NGOs to participate, but, more interestingly, it also created an Expert Commission: a standing committee of

about 30 people, chosen by the court, consisting mainly of NGO and private insurers' representatives as well as some academics. The commission's task was to enhance the court's technical knowledge by discussing the challenges faced by the health care system in implementing the court's structural injunctions and possible alternative means to comply. The commission met in Constitutional Court building, with court law clerks setting the agenda and moderating the discussion among the experts. Afterward, a summary of the debate and the conclusions were sent to the justices in charge of the monitoring process.

An interesting development occurred during this process, triggered by the interaction of courts and regulatory agencies. Much of the legitimacy of IRAs is derived from their "expert" status, as opposed to the "political" opportunism of nonindependent institutions and of Congress. The court's intervention seems also to place the onus on the "technical" side of the equation, this time, though, based on a different technical expertise: law. However, the court also creates mechanisms to draw from *other* technical knowledge and tries to include it in its own process of monitoring—not as a binding order, to be sure, but as a general framework of discussion.

The goal of this "expert" consultation seems different from public hearings, which the court also held. The idea here seems less to provide voice to stakeholders than to tap into expertise that the court seems to lack. This layout points to a form of participation in regulatory governance that is different from notice-and-comment procedures and other similar participatory arrangements.

It is hard to estimate the exact influence of this process in the final outcome. The court did not refer to this process in its further decisions, and the "Commission of Experts" was not convened again. The very existence of this process, however, underscores the importance of informal expert consensus in the delivery of essential services in Latin America. In much the same way that best practices are often the result of a technocratic consensus among experts who define the vocabulary being deployed by IRAs in domestic settings, the interaction of such agencies with courts seems also influenced by the role of expert knowledge.

The flow of such knowledge can be better understood in terms of the global regulatory space. It is developed in sites beyond a particular nation-state, such as the World Bank in the case of the *Handbook for Evaluating Infrastructure Regulatory Systems*, or the Inter-American Commission of Human Rights in the case of health indicators, and is then deployed transnationally in different domestic settings. Improving voice and accountability, especially in regard to this specific aspect of the global regulatory space and its impact on the delivery of essential services, remains challenging despite its importance.²⁹ Recent scholarship has tried to frame similar exercises of power through information as expressions of "international public authority," thus subject

29 Megan Donaldson & Benedict Kingsbury, *Ersatz Normativity or Public Law in Global Governance: The Hard Case of International Prescriptions for National Infrastructure Regulation*, 14(1) Chi. J. Intl. L. 1–51 (2013).

to requirements of public law or of global administrative law.³⁰ Opening new spaces of participation in the regulatory process risks expanding the influence of experts, whose opinions could outweigh the opinion of nonexperts; in the Colombian case, the “Commission of Experts” seemed to have more direct access to the decision-making process. Moreover, the question of accountability also poses challenges: should scholars think of expertise as a source of authority in the global regulatory space? How can they start thinking about accountability in that context?³¹

Conclusion: Courts and Agencies as Institutions, Actors, and Spaces of Deliberation

Our research posits a regulatory space where different institutions interact. This interaction occurs at three different levels.

On a first level, private parties (e.g., consumers and service providers) are actors that are regulated by these institutions; they have exogenous preferences, and courts and IRAs are constraints to their interactions; they are “institutions” in the sense that they embody and enact rules of the game that private actors must follow.³² This is the standard view of regulation and was observed in our research. For instance, in the waste disposal case, the central point was to create regulatory incentives so that informal waste pickers could continue doing their job. The IRA first had to adopt some command-and-control regulation in order to lead private suppliers to open a space for this to happen; it then had to force the discussion on certain contractual clauses to achieve this goal.

At this level, interinstitutional interaction presents certain kinds of challenges and opportunities for both private actors and institutions. For private actors, institutional interplay opens a wide range of possible strategic behaviors by adopting cross-institutional political strategies. Forum shopping is a possibility, as was the case in Bogotá, where waste pickers went to the Constitutional Court to get what the IRA was denying. Private parties may also engage in fostering the creation of a *new* institution (such as ACUMAR, in Argentina) to trigger interaction with existing institutions that may benefit the private actor. Moreover, private actors may seek to trigger internal insti-

30 On public law, see Armin von Bogdandy & Matthias Goldmann, *Taming and Framing Indicators: A Legal Reconstruction of the OECD's Programme for International Student Assessment (PISA) in Governance by Indicators: Global Power through Quantification and Rankings*, 52–85 (Benedict Kingsbury ed., Oxford U. Pr. 2012); on global administrative law, see Sabino Cassese & Lorenzo Casini, 2012. *Public Regulation of Global Indicators in Governance by Indicators: Global Power through Quantification and Rankings* 465–74 (Benedict Kingsbury et al. ed., Oxford U. Press).

31 See Rene Urueña, *The Rise of the Constitutional Regulatory State in Colombia: The Case of Water Governance*, 6(3) *Regulation & Governance* 282–99 (2010); David Kennedy, *Challenging Expert Rule: The Politics of Global Governance*, 27 *Sydney L. Rev.* 5 (2005).

32 Douglass C. North, *Institutions Matter*, *Econ. History* (1994), <http://128.118.178.162/eps/eh/papers/9411/9411004.pdf>.

tutional change by using interaction, as when Colombian health care patients used litigation in order to change internal procedures of health regulatory agencies. Finally, though we did not observe this, it is possible to expect that private actors may also seek to create strategic inconsistency, by seeking interaction between institutions that lead to inconsistent results.

For institutions, the main challenge at this level is effectiveness. Interinstitutional interplay may hinder the effectiveness of regulation directed toward private actors. In the waste management example, the IRA adopted a set of rules whose impact was undermined by the intervention of a court. However, interaction could also bolster effectiveness, by lending legitimacy to a weak institution (as was the case of health care in Colombia) or by providing an enforcement mechanism that the IRA lacked, as the example of ACUMAR in Argentina shows.

At a second level, institutions themselves are actors. As such, their interactions can be driven by strategic behavior as well: institutions can compete with each other, cooperate, or end up co-opting or dominating other institutions in the regulatory space. Our research suggests at least two ways to think about this scenario. First, IRAs behave as actors, and courts set the rules for their interaction. That was the case in Argentina, where several institutions with overlapping mandates behaved strategically and failed to solve an environmental challenge. The Supreme Court consequently stepped in to develop rules of coordination. Second, a court can also be one of the actors behaving strategically: the Colombian Constitutional Court competed with other agencies in the health care case, successfully leading many of them in following its regulatory scheme.

This latter situation brings up the question of the role of judicial review in the global regulatory space. As seen earlier, most literature in regulatory governance situates courts either as enforcers of property and contract rights or as a limit to the power of independent agencies. The case studies examined in this chapter suggest a different landscape. Courts seem not to be external to the regulatory space; rather, they appear to be actors within it. They develop specific regulations, compete with other regulatory agencies, and seem to be in need of legitimacy. This need for legitimacy may have implications on the institutional design of judicial review in Latin America, which has been traditionally expansive. Possible normative outcomes could include creating constitutional frameworks that restrain courts in their new regulatory role, or the exact opposite: embracing the role of courts as actors in the regulatory space, and developing constitutional frameworks that set the conditions for a wholly new form of regulation resulting from the interaction between courts and independent agencies. How would regulatory reform and judicial review be transformed if the rule (and not the exception) was active involvement of the judiciary in regulation?

At this second level, where institutions behave as actors, interaction also triggers interesting processes of learning and adaptation. The rationale of IRAs does not remain unchanged, as the waste management case showed.

Interaction can be structured in such a way as to take advantage of this learning process: some of the efforts discussed in this chapter (in Argentina, for instance, and in the health care case in Colombia) seem close to experimentalist views of governance. Such possible influence of experimentalist governance is in stark contrast when the focus is on best practices, but it may suggest an interesting range of possibilities to enhance delivery of essential services to the poorest. Instead of focusing on IRAs as stand-alone units and on the ways that things should be done, scholars could think in terms of interaction and how it triggers learning and experimentation. One way to make this approach operational is to think about institutional design that opens spaces for interactional learning. Some of the examples explored here, though, seem to do that on an ad hoc basis, without purposefully highlighting the learning aspect of the regulatory interaction.

From this perspective, multilateral financial institutions may have an important contribution to make. As seen, much of adapting and learning is based on knowledge. In fact, the very definition of the problems that need to be solved is influenced by issues of framing and cognitive path dependencies. While funds for institutional functioning are crucial (e.g., the World Bank's involvement with ACUMAR), much of the regulatory heavy lifting is done under the form of informal expert networks, often influenced by state-of-the-art knowledge produced by multilateral institutions. This is an angle of the delivery of essential services that seems important to explore, both in its promises and in its challenges of accountability and participation.

At the third level, regulatory regimes may also interact. Although this idea may seem peculiar from the perspective of law and development scholarship, it has proved fruitful in international law and international relations.³³ Global regimes, featuring a specialized set of norms, a distinct institutional architecture (including courts), a distinct epistemic community, and a particular rationale, can be seen as independent enough to “collide” with other specialized global regimes.³⁴ We observed some hints of this possibility. The waste management experience can be seen as part of Colombian institutional politics, but also as a Colombian expression of a more global interaction between international human rights and the rules of investment protection. While this approach is less conducive to specific proposals of domestic institutional reform, it would seem that improving delivery of essential services to the poor requires that scholars, activists, and development experts widen their angle to think also of delivery in terms of global governance.

33 See Martti Koskeniemi, *Hegemonic Regimes*, in *Regime Interaction in International Law: Facing Fragmentation*, 305–23 (Margaret Young ed., Cambridge U. Press 2012); Gunther Teubner & Peter Korth, *Two Kinds of Legal Pluralism: Collision of Transnational in the Double Fragmentation of the World Society*, in *Regime Interaction in International Law: Facing Fragmentation* (Margaret Young ed., Cambridge U. Press 2012); Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change*, 9(1) *Perspectives Pol.* 7–23 (2011).

34 Gunther Teubner & Andreas Fischer-Lescano, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, Mich. J. Intl. L. 999 (2004).

